UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES R. BARNES, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER SL07529010381 DATE: JUN - 5 1991

Douglas L. Ray, Memphis, Tennessee, for the appellant.

Charles H. Isabel, Memphis, Tennessee, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the December 20, 1990 initial decision in which the administrative judge dismissed his petition for appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, REVERSE the initial decision, and REMAND the appeal to the regional office for adjudication in accordance with this Opinion and Order.

BACKGROUND

The appellant worked as a Full-Time Regular Letter Carrier for the Memphis Post Office. In February and March, 1989, he submitted medical documentation to the agency that described serious medical conditions and set out severe work restrictions. Appeal File (AF), Tab 6, Subtab 4F.[1] The agency provided the appellant with temporary light-duty work in the clerk craft through May 18, 1990, but never granted him permanent light-duty status.[2] *Id.*

On April 10, 1990, the agency issued him a notice of proposed denial of continued light duty, and placement into nonduty, nonpay status. AF, Tab 6, Subtab 4D. On May 17, 1990, following its consideration of the appellant's reply to the proposed action, *id.*, Subtab 4C, the agency issued a decision letter that stated that, effective May 18, 1990, he would no longer be provided with light duty and would be placed in a nonduty, nonpay status "until such time as work within [his] medical restrictions [became] available or [his] medical restrictions change[d] to the point that [he was] able to perform work which [was] available." *Id.*, Subtab 4B. This letter also notified the appellant that he could use accrued

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[1] The appellant suffered from arthritis, diabetes mellitis, pain in his lower back, calves, feet, and ankles, and depression. *See generally* Appeal File (AF), Tab 6, Subtab 4. He also claims to suffer from dysthemic disorder with paranoid ideation. AF, Tabs 1 and 11.

[2] Light-duty assignments are governed by the procedures in the National Labor Agreement at Article 13. *See* AF, Tab 6, Subtab 2.

leave, if he had any, until it was exhausted or until he was able to return to duty. *Id.*

The appellant timely appealed to the Board,[3] alleging that the agency's action constituted either a constructive suspension under 5 U.S.C. § 7512(2) or a furlough under 5 U.S.C. § 7512(5). Petition for Appeal, AF, Tab 1. He also alleged that the agency had discriminated against him on the bases of sex, age, race, and handicap. *Id.*

After affording the appellant a hearing, the administrative judge issued an initial decision in which he found, initially, that the action could not be considered as a furlough because it had lasted for a period in excess of 30 days.[4] Initial Decision (ID) at 2 n.2. Because the administrative judge determined that the appellant's absence from duty had been voluntary, he also concluded that the agency's action did not constitute a constructive suspension. ID at 3-6. Finally, the administrative judge declined, for lack of an otherwise appealable matter, to address the appellant's discrimination claims. ID at 6.

In his timely petition for review, the appellant asserts that: (1) The agency's denial of light duty was improper; (2) the agency engaged in pressure tactics designed to bring

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[3] The administrative judge found that the appeal was timely under 5 C.F.R. § 1201.154(b)(2).

[4] The appellant did not allege that he had been affected by a reduction-in-force action. See 5 C.F.R. § 351.202(a)(1); *Raymond v. United States Postal Service*, 45 M.S.P.R. 16, 18-19 (1990).

about his resignation; (3) said alleged pressure tactics and harassment have exacerbated his medical conditions; (4) the administrative judge was biased against him; (5) he has subsequently received a letter proposing his removal for physical disability; (6) the deciding official perjured himself at the Board's hearing; and (7) the agency discouraged him from applying for disability retirement. The agency has filed a response, generally objecting to the petition for review.

ANALYSIS

We reopen this appeal because we find that the agency did constructively suspend the appellant. We also find, however, that, in so doing, it applied all requisite statutory procedures, and, on appeal, it supported its action by the requisite degree of evidence. Because the appellant established that an appealable action occurred, however, he is entitled to an adjudication of his discrimination claims. We therefore must remand the appeal for that purpose.

With regard to the appellant's petition for review, we find that the appellant has not supported his claim of bias on the part of the administrative judge. The other contentions in his petition are not relevant at this juncture, but the administrative judge may consider them, as appropriate, in his adjudication of the appellant's discrimination claims.

The appellant has not demonstrated that the administrative judge was biased against him.

In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). We find that the appellant has failed to overcome that presumption here. Rather, upon careful review of the instances that, he asserts, demonstrate that the administrative judge was biased against him and predisposed to rule in favor of the agency, Petition for Review File, Tab 1, we find that the cited examples merely show that the administrative judge attempted to inform the parties of pertinent case law, AF, Tab 7, and, generally, of the relative strengths, as he perceived them, of their positions on the issues. Such prehearing commentary is within the realm of the administrative judge's authority to "take all necessary action to avoid delay in all proceedings" under 5 C.F.R. § 1201.41. Without more, it is insufficient to establish that the administrative judge was biased. *See Barthel v. Department of the Army*, 38 M.S.P.R. 245, 250 (1988).

The agency imposed an indefinite constructive suspension upon the appellant.

In *Horner v. Schuck*, 843 F.2d 1368, 1376-77 (Fed. Cir. 1988), the court held that employees in light-duty assignments, who were placed in nonduty, nonpay status because of lack of work, were entitled, under their labor agreement,

to a 40-hour week. Thus, the court held that placing them in such status constituted adverse actions that were appealable to the Board. *Id.* In *Maltzman v. United States Postal Service*, 44 M.S.P.R. 239, 242 (1990), the Board determined that the holding in *Schuck* was limited to the situation where the employee was already in a light-duty assignment when placed in a nonduty, nonpay status. The Board contrasted that situation with one in which the agency denied an employee's request to be placed on light duty and the employee thereupon failed to report to his assigned position due to perceived medical problems. *Id.* The Board held that, in the latter situation, no appealable action had occurred. *Id.* The administrative judge found here that, pursuant to the holding in *Maltzman*, the appellant had not been subjected to an adverse action. ID at 4. Additionally, the administrative judge found that the agency's action was not a constructive suspension because it was not "disciplinary" within the meaning of *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 599-600 (Fed. Cir. 1987), and *Thomas v. General Services Administration*, 756 F.2d 86, 87-90 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 843 (1985). ID at 5. We disagree. The court in *Pittman* expressly held that an agency's placement of an employee into a nonduty, nonpay status pending inquiry into his medical ability to perform his duties was "disciplinary" and thus constituted a suspension. *See* 5 U.S.C. § 7501(2).

The outcome in *Maltzman*, as well as that in *Anderson v. Department of the Navy*, 45 M.S.P.R. 136, 142 (1990), and *Perry*

v. United States Postal Service, MSPB Docket No. SL34439010179, slip op. at 6 (Dec. 6, 1990), cases upon which the administrative judge also relied, hinged on whether the employee's absence from work had been voluntary on his part, or had been involuntarily imposed upon him by the agency. Here, although the agency was free to act as the agencies had in those cases, *i.e.*, to deny, within its discretion, the employee's request for light-duty placement and to allow him to assume the duties of his former position if he chose to do so, it did not follow that course. Rather, the agency affirmatively placed the appellant into an indefinite, nonduty, nonpay status and stated that it would not end that placement unless the appellant were to demonstrate that he was medically able to perform the duties of his position. AF, Tab 6, Subtab 4B, and Tab 9. For this reason, the administrative judge's finding that the appellant here "never presented himself for work," ID at 5-6, is not dispositive of the voluntariness issue.

We find that the agency's formal placement of the appellant into a nonduty, nonpay status contingent upon his submission of evidence that he was medically able to perform, renders this case indistinguishable from *Pittman*. In *Pittman*, at 599-600, the court held that an employee's placement into an enforced leave status, after the agency determined that he could not perform the full range of his duties due to medical restrictions, constituted an appealable suspension. Thus, we

find that, by its terms, the agency's decision letter imposed an indefinite constructive suspension upon the appellant.

The agency's action was procedurally correct and the agency proved the basis for its action, but the appellant's discrimination allegations must be addressed on remand.

It is undisputed that, in so suspending the appellant, the agency provided the requisite statutory procedures of 5 U.S.C. § 7513(b). Moreover, the administrative judge found that the appellant conceded, on appeal, that he could not perform the duties of his Letter Carrier position, due to his medical restrictions. ID at 6. The appellant established no right to placement in a light-duty assignment. *See Perry*, slip op. at 5 (denial of a request for light-duty placement is within the discretion of the agency). The administrative judge found that the agency proved that it did not have available work that was within the appellant's medical limitations. *Id.* Based upon all of the above findings, we conclude that the agency's action was procedurally correct, and that the agency supported its basis for the action by a preponderance of the evidence. See 5 U.S.C. § 7701(c)(1)(B). In *Pittman* at 600, the court sanctioned an agency's suspension of an employee "pending inquiry" into his ability to work, so long as requisite procedures had been followed.

Notwithstanding the above, 5 U.S.C. § 7701(c)(2)(B) provides that an agency action may not be sustained if it was based on prohibited discrimination, such as the appellant alleged below. Since the administrative judge is in the best position to make the necessary credibility findings on these

issues, *see Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985), we remand this appeal for the administrative judge to adjudicate the appellant's discrimination claims.

FOR THE BOARD:

per

Robert E. Taylor
Clerk of the Board

Washington, D.C.